No. 14,601

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES B. DOYLE,

Appellant,

vs.

OLIVER A. FOX, J. E. PATTERSON and COREY GABRIELSON,

Appellees.

BRIEF FOR APPELLEES.

MARVIN G. GIOMETTI,
JAMES P. SHOVLIN, JR.,
244 Kearny Street, San Francisco 4, California,
Attorneys for Appellees.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 14,601

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES B. DOYLE,

Appellant,

vs.

OLIVER A. FOX, J. E. PATTERSON and COREY GABRIELSON,

Appellees.

BRIEF FOR APPELLEES.

SUPPLEMENTAL STATEMENT OF THE CASE.

The facts as stated by Appellant in his opening brief are correct. Appellee, however, desires to present certain additional facts for the Court's consideration.

As is set forth in Appellant's opening brief the Appellees were the lessors of a new motel situated in Pleasanton, Alameda County, California. The motel consisted of 22 rental units, acreage adjacent to the motel, and a swimming pool. (T.R. 72.) The units were all furnished by the lessors. All furniture was new and made of ash. The kitchens were equipped with General Electric Kitchens, which in-

cluded among other things refrigerators and stoves. (T.R. 72.) In addition the Appellees provided the linens and were obligated to replenish them. (T.R. 73.)

In November of 1951 the Appellant sought out the Appellees and requested the opportunity to lease the premises representing to the Appellees that because of his experience in the motel business he could successfully operate this one. (T.R. 92.) Further negotiations followed, eventually resulting in a lease-purchase agreement.

Prior to the effective date of the lease-purchase agreement the Appellees communicated with the Area Rent Office at Hayward, California, to inquire if the agreement was subject to rent control. (T.R. 74.) They were advised that the master lease was not subject to control. (T.R. 74.) They were likewise advised by the law office of Hynes & Bowser, that the master lease was not subject to control. (T.R. 93.)

In May of 1952 an inquiry was forwarded from the Hayward Rent Office to the San Francisco Office requesting an opinion as to whether or not the master lease was subject to control. The inquiry was relayed to the chief counsel for the Office of Rent Stabilization, Washington, D. C. In due time a reply was received advising that the premises were subject to control, but since the maximum rent was in doubt within the meaning of Rent Regulation 1, Sec. 166, the director should establish a maximum rent based on comparable housing accommodations. This opinion was forwarded to the Hayward Rent Office, with a request that the Area Advisory Board recommend

a maximum rental based on comparable housing under the provisions of Sec. 166 of Rent Regulation 1. The Advisory Board in turn informed the Rent Director that no comparable housing accommodations existed in Southern Alameda County and likewise recommended the decontrol of the premises. Their recommendation was forwarded to the Washington Office, where it was denied. (T.R. 115, 116, 120, 121, 122, 123, 124.) Before any further action could be taken the question became moot.

In June of 1952, the Appellees requested an opinion of an attorney who also served as a member of the Area Rent Advisory Board as to whether or not the premises were controlled and what if anything they should do. (T.R. 112.) They were informed that he was of the opinion that the master lease was not subject to control, but that they should register for their protection. Accordingly, on June 9, 1952, the master lease was registered with the Office of Rent Stabilization, Hayward Office. (T.R. 83.) The maximum rent was set forth as "see lease". At the same time Appellees asked that office what rents to collect and they were informed that they should collect the rent provided for by the lease. (T.R. 76, 77.)

Appellees likewise testified that they on at least two occasions requested the Hayward Office of Rent Stabilization to establish the rent to which they were entitled. On each occasion that office refused to do so. (T.R. 79.)

The Appellant registered the rooms in January, 1952, and the maximum rent established for the units collectively (per month) was $6,864.00.

SUMMARY OF ARGUMENT.

It is conceded that the master lease was subject to control pursuant to the provisions of Sec. 39(c) of Rent Regulation 1. This concession leaves only one question to be resolved, specifically what rents were the Appellees entitled to collect.

ARGUMENT.

I.

THE MAXIMUM RENT FOR THE PREMISES CANNOT BE FIXED BY SEC. 93 OF RENT REGULATION 1.

The Appellant contends that the rents to which the Appellees are entitled is the first rent for the premises. He reaches this conclusion on the strength of Sec. 93, Rent Regulation 1, which provides:

> "For housing accommodations not rented on the maximum rent date which are rented after the maximum rent date, the maximum rent shall be the first rent for such accommodations after the maximum rent date * * *"

If the construction urged by Appellant is correct then the maximum rent is zero. It is admitted that nothing was paid by the Appellant to the Appellees for the month of January, 1952, the first month of the term.

Appellant seeks to buttress his position by pointing to Sec. 130, Rent Regulation 1, which provides for one of the grounds upon which the landlord may petition for an adjustment of rent. The section reads:

> "Varying rents. The rent on the date determining the maximum rent was established by lease or other rental agreement which provided for a higher rent at other periods during the term of such lease or agreement."

This section is of no assistance to Appellant for it presupposes that a maximum rent has been established and *secondly by its terms it is not applicable to the present situation.* (Emphasis ours.) The section applies where the lease provides for higher rentals at other periods, but here it was possible for the highest rental to be the first rental. If for example the motel operated at capacity in the first period the Appellees would have collected $6,864.00 minus $500.00 or a total of $6,364.00. Subsequent months could have produced less revenue and consequently a lower rental.

Appellant implicitly recognizes the incongruity of his position when he attempts to answer his own question, namely, what is the first rent? In answering this question he is forced to add a new term to the provisions of Sec. 93, Rent Regulation 1. Specifically he adds the term *paid.* The section itself refers not to the first rent paid but the first rent, which in this case is zero, a rental which not even this Appellant can accept.

Appellant then urges that if the first rent paid is not applicable, the first rent should be the formula "gross receipts less $500.00". To arrive at this conclusion, again additional material must be read into Sec. 93, Rent Regulation 1 upon which Appellant

relies. Certainly this is not justified by the Regulations, for the Regulations which subject these premises to control afford a specific and precise answer to the question here involved.

Sec. 166, Rent Regulation 1 provides the specific solution to the question presented to this Court. The section provides:

> "Sec. 166. *Orders where facts are in dispute, in doubt, or not known.* If the maximum rent, or any other fact necessary to the determination of the maximum rent, or the living space, services, furniture, furnishings, or equipment required to be provided with the accommodations, is in dispute between the landlord and the tenant, or is in doubt, or is not known, the Director at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact, or determining the living space, services, furniture, furnishings and equipment required to be provided with the accommodations which order shall be effective to establish the maximum rent from the effective date of regulation or date of first renting, whichever is later, but in no event earlier than July 1, 1947. If the Director is unable to ascertain such fact, or facts, he shall enter the order on the basis of the rent which he finds was generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date and, where appropriate, may determine the living space, services, furniture, furnishings and equipment included in such rent."

It is clear from the lease itself that the maximum rent is in dispute, in doubt or not known. In addition

to the provisions as to the payment of rent the lease provides for the Appellant to pay taxes and insurance; sums neither known or knowable. Plus these factors rental payments were credited to the purchase price to be paid by Appellant for the premises. Thus the factual picture brings the problem squarely within the framework of Sec. 166, Rent Regulation 1.

II.

WHERE THE MAXIMUM RENT IS TO BE DETERMINED UNDER THE PROVISIONS OF SEC. 166, RENT REGULATION 1, AND THE RENT IS NOT SO DETERMINED THE LANDLORD IS ENTITLED TO THE RENTS COLLECTED.

A similar situation was presented to the Courts in *Rhodes v. Hanschl,* 94 F. Supp. 1009. There, landlord failed to register rented premises with the Area Rent Director at the beginning of the lease as required by the Housing and Rent Act of 1947, as amended, 50 U.S.C.A. Appendix, Sec. 1881 et seq. When the premises were registered a lower maximum rent was prescribed by the Director's order effective as of the next rent payment day. The Plaintiff contended that the failure of the Rent Director to make the order retroactive made the Regulation invalid because the tenant's claim can be defeated by inaction on the part of the Area Rent Director. The Court rejected this argument, stating:

> "The Statute and Regulations made his rents tentative but not unlawful. Until the contingency of readjustment occurred, the tenant could have

had no course of action for recovery of any part of the rental exacted by the landlord."

In addition the Court stated in substance that under these facts the rent stipulated in the lease remained the legal maximum until the lower maximum was prescribed by the Director's order. Likewise that Court pointed out that the statute does not deal with refunds. It provides for the recovery by the tenant of "any payment of rent in excess of the maximum rent prescribed, that is an overcharge as distinguished from a refund."

It follows therefore that since a maximum rent was not fixed Appellees are entitled to retain the rents collected by them.

Appellant seeks to avoid Sec. 166, Rent Regulation 1 by the following argument which appears on page 21 of his brief:

> "If the Rent Director had fixed the maximum rent pursuant to Sec. 166, then the sec. and any determination made pursuant thereto would have been relevant. But, in this case, no order fixing maximum rent was ever made pursuant to Sec. 166 (T.R. 79, 80, 110, 123; Request for Admission No. 6, T.R. 37, admitted by Answer to Request, T.R. 39). Consequently it becomes the province of the Court to determine what the maximum rent was."

There are two errors inherent in this argument. First that for Sec. 166 to be applicable a determination must have been made pursuant thereto. Thus

Appellant implicitly admits that Sec. 166 was the proper section to resolve the controversy, but since it wasn't employed it is now irrelevant. Therefore the maximum rent must be determined by Sec. 93 of Rent Regulation 1. This is a singular position, for by the terms of the two sections they are mutually exclusive. If Sec. 166 was applicable, which Appellant admits, then Sec. 93 is not applicable.

Secondly Appellant would have the District Court make a determination that the Rent Director failed to make and which, if he had made, could not have operated retroactively.

In *United States v. McCrillis,* 200 F. 2d 884, a case upon which Appellant places heavy reliance the Court stated:

> "For cases where there is a dispute or doubt as to the facts necessary to the determination of a maximum rent, we can see that it was an appropriate exercise of the regulatory power, in aid of the orderly administration of the Act, for the Housing Expediter to provide after notice and hearing, for the administrative determination of such doubtful or disputed fact, so as definitely to fix the maximum rent, *for the future,* in accordance with that determination."

The same Court at another place in its opinion said:

> "An order of the sort here involved * * * could lawfully have effect only as fixing the maximum rent prospectively from the date of its issuance."

Likewise in *Markbreiter et al. v. Woods,* 163 F. 2d 993, the Court held that the Rent Director could not

establish maximum rents retroactively and since controls were ended the question of prospective operation must be wholly moot.

Thus Appellant would have the Court do what the Rent Director could not have done. In this connection the attention of this Honorable Court is respectfully directed to full and very able discussion of this point in the Memorandum Opinion of the Honorable District Judge (T.R. 41-47) wherein the Court stated:

> "Since the Area Rent Director failed to establish a maximum under Section 166 during the period of the application of rent regulations; since the rent control law terminated before the imposition of maximum rent—which could not have been made retroactive (Markbreiter v. Woods, 163 F.2d 993)—defendants argue that no ceiling existed. Accordingly, they assert that there could have been no payment in excess of a maximum rent prescribed and thus there could have been no overcharge.
>
> "There is no controlling authority on this subject. In order to make applicable plaintiff's legal theory that the *first rent* under the lease formula for the accommodations constituted the maximum under the terms of the regulations (Sec. 93 of Rent Regulation 1), it would be necessary for the Court to adopt, quite arbitrarily, a part of the lease, to the exclusion of the other rental provisions in the same document which was tailored to meet a specific landlord-tenant commercial relationship. Adoption of the formula requires the Court to implement the regulations and to conjecture as to their scope.

"It is conceded that no rent was paid the first month. Therefore, we must look to the lease for aid and assistance. The rental provisions cannot be segmented in order to fix a maximum. (Cf. OPA interpretation MR-I issued Jul. 7, 1942; Revised May 13, 1943; Pike & Fischer OPA Service Vol. 8, p. 200:1115.) This Court is in no better position than the Area Rent Control Director was when he was petitioned to make a determination. Nor has the Court factors of comparable rental conditions to look to for guidance.

"The precise problem does not involve abstract legal propositions, nor can it be disposed of by the application of the principles enunciated in United States v. McCrillis, 200 F.2d 884.

"The maximum rental not having been declared or fixed in the first instance either by administrative process or judicial sanction or decree, any action fixing a maximum rental of an amount less than that called for in the rental clause of the lease would in effect result in retroactive procedure wherein plaintiff would receive an unwarranted refund. Rhodes v. Hanschl, 94 F. Supp. 1009 at 1010."

CONCLUSION.

All of the arguments cited in Appellant's brief appeared in the briefs and oral argument submitted by him to the United States District Court. These arguments and authorities do not, and cannot, meet

Appellees' contention that they are entitled to retain the rents collected by them from Appellant.

Therefore, the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
May 13, 1955.

Respectfully submitted,
MARVIN G. GIOMETTI,
JAMES P. SHOVLIN, JR.,
Attorneys for Appellees.